District of Columbia

Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
810 First Street, NE – Second Floor
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

Parent on Behalf Student[1], Petitioner, v. [redacted] ("LEA") Respondent. Case # 2016-0230 Date Issued: December 10, 2016	HEARING OFFICER'S DETERMINATION Hearing Date: November 30, 2016 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to this decision which must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on November 30, 2016, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____and in grade _____.[2] He resides with his parent in the District of Columbia and is eligible for special education and related services pursuant to IDEA with a disability classification of other health impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD") and Opposition Defiant Disorder ("ODD").

In school year ("SY") 2014-2015 the student began attending a District of Columbia public charter school ("School A" and/or "Respondent") that is its own local educational agency ("LEA") for special education purposes.

On October 19, 2015, the student's mother ("Petitioner") submitted a written request to School A for the student to be evaluated for special education. On November 16, 2015, School A acknowledged her request and informed Petitioner, among other things, that School A would review the student's educational and behavioral data and determine whether to proceed with an evaluation. On November 16, 2015, School A issued a prior written notice ("PWN") indicating that after a review of existing data it would not proceed further with evaluating the student.

On March 29, 2016, the parent submitted a second written request for evaluation to School A. On March 30, 2016, School A sent Petitioner an email stating School A did not suspect the student to have a disability, and therefore, would not proceed with a psychological evaluation.

Petitioner retained an educational advocate, who on April 20, 2016, sent School A an email stating that she represented Petitioner and requesting that the student be evaluated. On May 24, 2016, School A convened a multidisciplinary team ("MDT") meeting to again review existing data on the student. School A team members agreed there were no academic concerns regarding the student and in their opinion further evaluation of the student was not warranted. Nonetheless, the team agreed to move forward with evaluations based on Petitioner's insistence.

School A's psychologist completed the psycho-educational evaluation report on July 14, 2016. The evaluation assessed the student's intellectual, academic and social emotional functioning. The psychologist concluded the student met the diagnostic criteria for ADHD and ODD.

[2] The student's current age and grade are listed in Appendix B.

On July 21, 2016, School A convened an eligibility meeting at which the psycho-educational evaluation was reviewed. The team determined the student met the eligibility criteria for OHI due to ADHD. The team agreed to develop a behavior intervention plan ("BIP") for the student to address his behavior concerns and to move forward with developing an individualized educational program ("IEP") within thirty days.

On August 3, 2016, Petitioner, through her educational advocate, formally disagreed with components of the psycho-educational evaluation, and requested that School A amend its evaluation to remove the ODD diagnosis and grant Petitioner an independent evaluation ("IEE") with School A funding based on Petitioner's disagreement with School A's evaluation.

On August 10, 2016, School A's counsel responded to Petitioner's request stating School A would not grant the IEE, stood by its evaluation and was prepared to defend its evaluation in a due process hearing. After a month of back and forth communication between School A's counsel and Petitioner's advocate about Petitioner's concern with School A's evaluation, the parties reached an impasse.

Petitioner demanded an IEE or that School A defend it evaluation in due process. On September 26, 2016, Petitioner filed her due process complaint before School A filed for due process to defend its evaluation.

Relief Sought By Petitioner:

Petitioner seeks as relief that School A be ordered to fund an independent comprehensive psychological and/or that the ODD diagnosis in School A's psycho-educational evaluation be removed and that School A be ordered to provide the student compensatory education from February 2016 (120 days after October 19, 2015, evaluation request) to the end of SY 2015-2016.

Respondent's Response to Complaint

On October 4, 2016, Respondent filed a response to the complaint. The response contained a counterclaim to defend School A's evaluation. In its response, School A admitted Petitioner requested the student be evaluated for special education on October 19, 2015, and that on November 16, 2015, the request was denied after a review of existing data. School A denied that the student's behavior gave reason to suspect a disability or his need for special education.

School A admitted Petitioner submitted a second request for an evaluation for special education in March 2016 and that request was also denied because in School A's opinion there was no reason to suspect that the student had a disability or needed special education. School A admitted that Petitioner, through her advocate, again requested an evaluation for special education on April 20, 2016. School A denied that the two previous refusals to conduct testing of the student in any way violated IDEA or denied the student FAPE.

School A admitted Petitioner requested an IEE on August 3, 2016, but denied that it failed to timely respond to that request. School A asserted that neither Petitioner, nor her advocate,

responded to the written offer of settlement and a follow up email was sent to them on September 7, 2016. On September 22, 2016, School A informed the parent that its due process hearing request would be filed first thing the following week. On the day that School A was prepared to file its hearing request, Petitioner filed her due process complaint. School A denies that it violated IDEA by failing to timely respond to the parent's request for an independent evaluation. School A asserted any delay in School A filing its hearing request was the result of Petitioner's delay in responding to settlement discussions and that Petitioner did not allege facts to support her claim that School A's evaluation is inappropriate.

Respondent's Counterclaim

Respondent asserts in its counterclaim that it completed a psycho-educational evaluation for the student on July 14, 2016, that qualified personnel conducted the evaluation, used a variety of assessment tools as well as technically sound instruments, and the evaluation was in no way deficient. School A asserts its psychologist's findings in the psycho-educational evaluation are supported by the assessment results, and the results, including those regarding the student's academic achievement, are valid, reliable and appropriate. [3]

Relief Sought By Respondent

Respondent requests that its evaluation be determined appropriate under IDEA pursuant to 34 CFR §§ 300.304 – 300.306 and that Petitioner's complaint be dismissed with prejudice.

Resolution Meeting and Pre-Hearing Conference:

The parties did not participate in a resolution and mutually agreed not to proceed directly to hearing in this matter. The 45-day period began on October 26, 2016, and ends [and the Hearing Officer's Determination ("HOD") is due] on December 10, 2016.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference on the complaint on October 27, 2016, and, issued a pre-hearing order ("PHO") on October 31, 2016, outlining, inter alia, the issues to be adjudicated.

ISSUES: [4]

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to timely evaluate the student based on parental requests made on October 19, 2015, and April 20, 2016.

[3] Petitioner filed no response to the counterclaim prior to Respondent filing a motion for default finding against Petitioner relative to the counterclaim. On November 24, 2016, the Hearing Officer issued an order denying Respondent's motion but limiting Petitioner's defense to the counterclaim to the assertions Respondent stated in the counterclaim as Petitioner's basis for objecting to School A's evaluation and requesting the IEE.

[4] The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these are the issues to be adjudicated.

2. Whether the LEA denied the student a FAPE by failing to provide an independent evaluation without unnecessary delay, or timely requesting a due process hearing after a parental request for an independent evaluation and Respondent's refusal to conduct the evaluation.

3. Is the evaluation Respondent conducted of the student dated July 14, 2016, appropriate under IDEA pursuant to 34 CFR §§ 300.304 – 300.306.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 13 and Respondent's Exhibits 1 through 18) that were admitted into the record and are listed in Appendix A.[5] The witnesses testifying on behalf of each party are listed in Appendix B.[6]

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence that LEA denied the student a FAPE by failing to timely evaluate the student after Petitioner's October 19, 2016, request. However, School A evaluated the student within the required 120 days of the April 20, 2016, request. Petitioner did not sustain the burden of proof that School A failed to, without unnecessary delay, either grant the requested IEE or file for due process to defend its evaluation. Finally, School A sustained the burden of proof that its July 14, 2016, psycho-educational evaluation of the student was appropriate and met the requirements under IDEA. Petitioner presented no evidence in support of compensatory education. Although, School A sustained the burden proof on the final issue, the Hearing Officer, nonetheless, as relief for the denial of FAPE determined, granted Petitioner's request for an IEE as remedy for School A's failure to timely evaluate the student.

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[5] Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

[6] Petitioner presented three witnesses: (1) Petitioner, (2) an independent psychologist and (3) Petitioner's educational advocate. Respondent presented four witnesses: (1) School A's former director of student support, (2) the School A psychologist who evaluated the student, and (3) an independent psychologist who testified solely as an expert witness, and (4) the student's School A general education teacher.

FINDINGS OF FACT: [7]

1. The student resides with Petitioner in the District of Columbia and is eligible for special education and related services pursuant to the IDEA with a disability classification of OHI due to ADHD and ODD. (Respondent's Exhibit 13-1)

2. In SY 2014-2015 the student began attending School A, a District of Columbia public charter school that is its own LEA for special education purposes. (Petitioner's testimony)

3. During the student's first year at School A, Petitioner began receiving notices from School A staff about the student's behavior difficulties starting in November 2014. Petitioner received inconsistent information from School A about the student. On one hand, School A staff stated the student displayed leadership qualities and had good academics. On the other hand, Petitioner received complaints about the student's behavior. The student's parents divorced during this period and the student was seeing a therapist, so Petitioner agreed with School A to simply observe the student's behavior over time. (Petitioner's testimony)

4. In September 2015 Petitioner made a request to School A that the student be evaluated. School A responded to Petitioner's request by reviewing the student's academic, attendance, and behavioral data. On October 1, 2015 a School A staff member emailed Petitioner and stated that based upon the staff member's review, the only area of concern was the student's behavior. The staff member requested more clarification about Petitioner's concerns about the student. (Petitioner's Exhibit 2-2)

5. The student's behavioral difficulties were reflected in his school disciplinary report. In review of the student's behavior, School A noted that as of October 19, 2016, the student has had five official behavior write-ups. In each instance, the student is noted as the instigator. The write-ups cover inappropriate language towards staff and students (cursing, teasing, disrespect, not following directions) as well as physical aggression. (Witness 6's testimony, Petitioner's Exhibit 2-1, 6-1, Respondent's Exhibit 2-4)

6. On October 19, 2015, Petitioner submitted a written request to School A for the student to be evaluated for special education. On November 16, 2015, School A acknowledged Petitioner's request by letter and informed Petitioner, among other things, that School A next steps would be to "review various educational and behavioral data and determine whether to proceed with an evaluation." (Respondent's Exhibit 1-1)

[7] The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

7. On November 16, 2015, School A issued a prior written notice ("PWN") indicating that after a review of existing data "the IEP team" would not proceed further with the evaluation process after the team analysis of existing data. (Petitioner's Exhibit 3-3)

8. In response to Petitioner's request that the student be evaluated, School A reviewed the student's academic and behavioral data and prepared a document entitled "Analysis of Existing Data" or "AED". The data reflected that the student's academic functioning was on grade level in math, reading and written expression. The behavior data and discipline record demonstrated the student engaged in inappropriate language towards staff and students (cursing, teasing, disrespect, not following directions) as well as physical aggression and was out of class at least once per day to take a break, and teachers reported he often simply left class without permission. During the classroom observations of the student, he was observed to be frequently off task but able to be redirected. (Respondent's Exhibit 2-1, 2-4)

9. On November 20, 2015, School A convened a meeting to determine if additional testing was needed for the student. Petitioner participated in the meeting by telephone. The School A personnel who participated included two special education teachers, the student's general education teacher, the school psychologist, school counselor, and the School A LEA representative. (Respondent's Exhibit 3-1)

10. During the November 20, 2015 meeting, School A staff reviewed the academic and behavioral data the School A staff members had compiled on the student. Although the student had behavior difficulties, School A team members did not believe the student's behavior was affecting his academic performance. The School A members of the team concluded, based on the student's academic performance, that there was no need to formally evaluate the student and no need to conduct a functional behavioral assessment ("FBA") to address the student's behavior. (Witness 3's testimony, Respondent's Exhibit 3-1, 3-2)

11. Petitioner thought the November 20, 2015 meeting was productive, and each of the student's teachers and the school psychologist said the student's behavior was getting better. The student's behavior improved temporarily but declined soon after that meeting. The student behavior concerns continued to occur through March 2016 leading to in-school and out of school suspensions. (Petitioner's testimony, Petitioner's Exhibit 6-2)

12. During SY 2015-2016 the student exhibited attention concerns and behavior difficulties in the classroom that interfered with his learning. He often would loose focus and not complete work. At least one of his teachers was able to use techniques to redirect and refocus the student so that he was able to access the curriculum and make academic progress. (Witness 6's testimony)

13. Petitioner believed it was futile to make another request to School A, since her prior request had been refused. After speaking with an independent psychologist who gave Petitioner specific language to put in an email to School A, Petitioner again requested that School A evaluate the student. On March 29, 2016, the parent submitted a second

written request for evaluation to School A citing her reasons for the request including concerns about the student's in school suspensions and distractedness. (Petitioner's testimony, Respondent's Exhibits 4-1)

14. On March 30, 2016, School A sent Petitioner an email stating that after a review of the student's academic record with the administrative and teaching teams, data did not indicate that the student's academic progress was in decline or had been halted and he continued to progress as expected. School A did not suspect the student to have a disability and therefore was not proceeding with a psychological evaluation. School A, however, offered to conduct a FBA based on Petitioner's expressed concerns about the student's in school suspensions and distractedness. (Witness 3's testimony, Respondent's Exhibit 5-1)

15. Petitioner retained an educational advocate who on April 20, 2016, sent School A an email stating that she represented Petitioner and requesting that the student be evaluated for a suspected disability based on his behavior, school performance and multiple suspensions. The email included a form with Petitioner's consent for School A to evaluate the student. Even after the advocate's request, School A initially refused to evaluate the student. (Witness 2's testimony, Petitioner's Exhibit 4-1)

16. On May 24, 2016, School A convened a MDT meeting to again review existing data on the student and determine if additional evaluations would be conducted. Petitioner attended the meeting with her advocate. Petitioner expressed her concerns about the student's inattention and disciplinary infractions. The School A staff shared that student was operating at or near grade level in all areas. The School A team members asserted there were no academic concerns regarding the student and that in their opinion further evaluation of the student was not warranted. Nonetheless, the team agreed to move forward with evaluations based on Petitioner's insistence. (Petitioner's testimony, Witness 3's testimony, Petitioner's Exhibit 8-1, 8-2, Respondent's Exhibit 7)

17. On May 24, 2016, School A issued a PWN that stated that the team did not suspect the student had a disability that required special education but was willing to evaluate the student based on the parent's concerns and would conduct a psycho-educational evaluation and a FBA. (Respondent's Exhibit 9)

18. School A began the evaluations of the student in May 2016. A psycho-educational evaluation was conducted assessing the student's intellectual, academic and social emotional functioning. The psychologist reviewed the student's behavior incidents from SY 2014-2015 and SY 2015-2016 that were significant for class disruptions, insubordination and physical aggression. (Witness 4's testimony, Respondent's Exhibit 10-3, 10-4)

19. The School A psychologist conducted classroom observations of the student and employed assessment tools that included, among others, the Wechsler Intelligence Scale for Children - [Fourth] Edition (WISC-V), Wechsler Individual Achievement Test - Third Edition (WIAT-III), Behavior Assessment Scales for Children – Second Edition (BASC-

2), Conner's Behavior Rating Scales- Third Edition (Conner's 3), Scale for Assessment of Emotional Disturbance – Second Edition (SAED-2), Roberts Apperception Test For Children – Second Edition (RATC-2). The assessments and measures the psychologist used were appropriate and she was qualified to administer them. The psychologist used correct and appropriate methodologies in her administration of the assessments and the evaluation results were valid and reliable. (Witness 4's testimony, Witness 5's testimony, Respondent's Exhibit 10-1)

20. The School A psychologist noted that although the student's academic performance was reportedly strong, his teaching team had concerns about his emotional, social and behavioral development and he had an excessive number of discipline referrals for incidents of disrespect to peers and staff, bullying, disrupting class, horseplay, fighting and skipping class. (Witness 4's testimony, Respondent's Exhibit 10-5, 10-6)

21. During the psychologist's classroom observations of the student was off task and disruptive the majority of the class. (Witness 4's testimony, Respondent's Exhibit 10-7, 10-8)

22. The student's cognitive functioning was assessed as average, but he demonstrated weakness in executive functioning skills and his processing speed was below average. The student's academic achievement was average, except in the skill areas of reading accuracy and multiplication fact fluency. The psychologist concluded that because of the student's significant processing speed deficits, which impede his pacing in nearly all tasks, he met the criteria of a specific learning disability in reading. (Witness 4's testimony, Respondent's Exhibit 10-13, 10-15, 10-16, 10-27, 10-28)

23. The School A psychologist assessed the student's social emotional functioning through review of the student's behavioral history, her classroom observations of the student and the ratings sales she provided to the student's parent, the student, and some of his teachers. (Witness 4's testimony, Respondent's Exhibit 10)

24. Based on the consensus of the responses to the assessment ratings scales provided by the student's teachers, the School A psychologist concluded the student displays mild to moderate ADHD symptoms. The psychologist asserted that some of the student's hyperactive/impulsive actions are in part learned behaviors to gain attention and avoid work assignments. The feedback from the student's teachers noted the student's disruptive behaviors in addition to his inattentiveness, but the feedback provided by the student's parent as to his behaviors at home did not indicate such problems. The behaviors at home only focused on the student's inattention. After a review of all the data from her assessments and her own observations of the student, the School A psychologist concluded the student met the diagnostic criteria for ADHD and ODD. The School A psychologist completed the psychological evaluation report on July 14, 2016. (Witness 4's testimony, Respondent's Exhibit 10-1, 10-28)

25. Although the student did not display the same behavioral difficulties at home as he did at school, and the parent and the student did not rate the student has having symptoms of

ODD, based on the student's conduct and the responses from the student's teachers regarding the student's behavior, the School A psychologist's conclusion regarding the ODD diagnosis was supported by the evaluation data. (Witness 4's testimony, Witness 5's testimony)

26. In May 2016 School A conducted a FBA of the student. The behaviors of concern included the student being out of seat, defiance, physical and verbal aggression, late assignments, bullying, fighting talking out, making excuses, distracting others and seeking attention. The FBA concluded the student's behaviors allow him to gain attention from peers and avoid or postpone work and/or leave the classroom, although he generally accepts redirection and gets back on task. (Petitioner's Exhibit 8-1, 8-2)

27. On July 21, 2016, School A convened an eligibility meeting at which the psycho-educational evaluation and the FBA were reviewed. The School A psychologist shared her diagnosis of the student with mild ADHD and ODD based on his conduct. The team determined the student met the eligibility criteria for OHI due to ADHD. The team agreed to develop a behavior intervention plan ("BIP") for the student to address his behavior concerns and to move forward with developing an IEP for the student within thirty days. The team also agreed to conduct additional evaluations of the student. (Respondent's Exhibits 12-1, 12-3, 12-4, 13)

28. Petitioner reviewed School A's psycho-educational evaluation after it was completed. She thought the evaluation was comprehensive. However, the evaluation included language describing the student as a bully and she wanted those references removed from the evaluation. With regard to the ODD diagnosis and the references of the student being a bully, Petitioner has concerns how that information might affect the way the student is viewed and treated at School A and how he might he viewed in the future at any other school he might attend. Based on these concerns Petitioner's educational advocate requested an IEE on Petitioner's behalf. School A refused to authorize the IEE. (Petitioner's testimony)

29. On August 3, 2016 Petitioner, through her educational advocate, formally disagreed with the components of the psychological evaluation, and requested that School A amend its psychological evaluation to remove the ODD diagnosis and grant Petitioner an independent evaluation(s) (IEE) with School A funding based on Petitioner's disagreement with School A's evaluation. (Respondent's Exhibit 16-13, 16-14)

30. On August 10, 2016, School A's counsel responded to Petitioner's request stating School A would not grant the IEE, that School A stood by its evaluation and was prepared to defend its evaluation in a due process hearing. (Respondent's Exhibit 16-13)

31. On August 15, 2016, School A developed a BIP to address the behaviors identified in the FBA. The BIP identified the replacement behaviors that would be sought and the School A staff action steps that would assist in altering the student's behaviors including such actions as frequent physical reminders such as a touch on the shoulder, maintaining a

behavior chart, and consequences for the student's noncompliance including telephoning his parent to discuss his behavior. (Petitioner's Exhibit 9-1)

32. On August 23, 2016, Petitioner's educational advocate sent an email to School A's counsel stating that Petitioner "would be willing to withdraw her request for the IEE Psychological only if the ODD diagnosis is removed from the report. However, the parent continues to request an IEE Educational." The email also stated the following: "As you are already aware of [School A's] obligation to [to] defend their conducted evaluation in Due Process if they choose. The parent is not obligated to provide the information that she received from the Clinical Psychologist. Therefore, if your preference is to avoid litigation then amend the report to remove ODD and authorize funding for an[d] IEE educational." (Respondent's Exhibit 16-11, 16-12)

33. On August 29, 2016, Petitioner's counsel emailed Petitioner's advocate stating that School A was "not willing to fund independent evaluations or change the diagnoses in the evaluation that it conducted. [School A will prepare to request a due process hearing." (Respondent's Exhibit 16-11)

34. On August 31, 2016, School A counsel sent Petitioner and her advocate an email stating that School A had reversed its previous position and offered to remove the ODD diagnosis from the evaluation contingent upon the terms of an attached agreement. (Respondent's Exhibit 16-11)

35. On September 7, 2016, Petitioner responded to School A's counsel and stated that she had been extrememly busy and unable to respond the School A's offer and would get back to her by the end of that week. (Respondent's Exhibit 16-8)

36. On September 12, 2016, School A's counsel sent an email to Petitioner and copied her advocate, asking whether Petitioner has yet reviewed the agreement she had sent Petitioner on School A's behalf. (Respondent's Exhibit 16-8)

37. On September 12, 2016, Petitioner's advocate responded to the email stating that Petitioner did not agree with the agreement School A proposed and reiterated her request for the School A evaluation to be changed and for School A to provide funding for an educational evaluation, ending the email with the following statement: "Therefore, the parent continues to await[s] a response to the educational IEE by the school agreeing to fund it or filing a due process to defend it."

38. On Monday, September 12, 2016, School A's counsel sent a response email to Petitioner's advocate, copying Petitioner, stating that that the demand for the educational IEE was not what was discussed when they had talked by telephone before the agreement was sent and if Petitioner insisted on the educational IEE School A would file a due process complaint to defend its evaluation. School A's counsel stated that if she did not hear from Petitioner "by close of business on Wednesday, I will prepare the hearing request and submit to the Office of Dispute Resolution by sometime next week." (Respondent's Exhibit 16-2)

39. On Wednesday, September 21, 2016, School A's counsel sent an email to Petitioner asking that Petitioner let her know if Petitioner had retained an attorney as she would "be filing a due process hearing on [School A's] behalf in the next few days." (Respondent's Exhibit 16-1)

40. On Thursday, September 22, 2016, Petitioner's advocate sent an email stating the parent had retained counsel and giving the attorney's name. (Respondent's Exhibit 16-1)

41. On Thursday, September 22, 2016, School A's counsel sent a return email which indicated that the School A hearing request would be filed "first thing next week." (Respondent's Exhibit 16-1)

42. Before School A's counsel filed a due process complaint Petitioner filed her own due process complaint on Monday, September 26, 2016. As a part of School A's response to Petitioner's complaint, School A's counsel filed a counterclaim to defend School A's evaluation. (Due Process Complaint, School A's Response & Counterclaim)

43. Petitioner engaged a psychologist, who was designated as an expert witness, to review the psycho-educational evaluation School A conducted. The psychologist conferred with Petitioner about the student and offered his opinions on the appropriateness of the psycho-educational evaluation School A conducted and regarding the timeliness or lack thereof of School A evaluating the student following the parent's request that School A evaluate the student and the appropriateness of the evaluation. (Witness 1's testimony)

44. Since School A conducted the evaluation and the student had been found eligible and provided special education services, the student has had fewer detentions, made the basketball team, and his grades have improved. Prior to School A evaluating the student, finding him eligible and providing him services, he was frequently in detention and often suspended. Since the student has been found eligible and provided an IEP and services Petitioner has not heard at all from School A about the student's behavior. (Petitioner's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:
A free appropriate public education or FAPE means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [7] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO, Petitioner had the burden of production and persuasion on issues #1 and # 2 and Respondent had the burden of production and persuasion on issue #3.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA denied the student a FAPE by failing to timely evaluate the student based on parental requests made on October 19, 2015, and April 20, 2016.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that School A failed to timely evaluate the student following Petitioner's October 19, 2015, request that the student be evaluated. However, School A evaluated the student within the required 120 days of the April 20, 2016, request.

Pursuant to 34 C.F.R. § 300.301 a LEA must conduct a full and individual initial evaluation if either a parent or the LEA initiate a request for an evaluation to determine if the child is a child with a disability and that evaluation must be conducted within the mandated timeframe.

A LEA is required to complete evaluations of children in 120 days under the IDEA and DC law. 34 CFR § 300.301(c)(ii)[8]; D.C. Code § 38-26561.02. [9]

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[8] 34 C.F.R. § 300.301 (a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with Sec. Sec. 300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part. (b) Request for initial evaluation. Consistent with the consent requirements in Sec. 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. (c) Procedures for initial evaluation. The initial evaluation-- (1) (i) Must be conducted within 60 days of receiving parental consent for the evaluation; or(ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and(2) Must consist of procedures-- (i) To determine if the child is a child with a disability under Sec. 300.8; and(ii) To determine the educational needs of the child.

[9] Beginning July 1, 2017, or upon funding, whichever occurs later, an LEA shall assess or evaluate a student who may have a disability and who may require special education services within 60 days from the date that the student's parent or guardian provides consent for the evaluation or assessment. The LEA shall make reasonable efforts to

Pursuant to 34 C.F.R 300.304 (b)(2) and (3), in conducting the evaluation, the public agency must not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The evidence in this case demonstrates that the student had behavioral difficulties during his initial year at School A during SY 2014-2015. Petitioner agreed with School A that the student should be observed and she did not pursue evaluations until the next school year.

On October 19, 2016, Petitioner requested the student be evaluated. School A responded to the request by reviewing data on the student and preparing a AED document that stated that there was no basis to conduct formal evaluations of the student. School A convened a meeting that the parent participated in by telephone. The School A staff indicated that the student was doing better behaviorally, and the parent acquiesced to the school not conducting evaluations.

The evidence demonstrates the student's behavior improved temporarily but his behavior difficulties quickly reemerged and persisted. Although School A reviewed data on the student and prepared and AED, School A chose not to conduct any assessments of the student, and in particular, did not assess his social emotional functioning. The AED that School A conducted was not a sufficient evaluation of the student in response to Petitioner's October 19, 2015, request that student be evaluated.

Petitioner made another request that the student be evaluated in March 2016. School A again refused to evaluate the student. It was not until Petitioner retained an educational advocate who then made a request on Petitioner's behalf did School A move forward with evaluating the student. Even then, School A expressed a reluctance to do so.

When the student was finally evaluated, the School A psychologist not only determined the student met the criteria of OHI disability due to ADHD, but concluded he met the criteria for ODD, based significantly upon the behaviors the student had displayed at School A in SY 2014-2015 and SY 2015-2016, during the period Petitioner first requested that the student be evaluated. Ultimately, the student was found to be a child with a disability and in need of special education.

Respondent unconvincingly argued that the AED it completed was sufficient action in response to Petitioner's request and there was reasonable basis in October 2016 for School A not to proceed to evaluate the student. The facts of the case belie that assertion.

34 C.F.R. § 300.304 and § 300.305 require that in evaluating a student a LEA must ensure that a child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities, and as part of an initial evaluation,

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obtain parental consent within 30 days from the date the student is referred for an assessment or evaluation. D.C. Code § 38-2561.02(a)(2)(A).

review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers; and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child is a child with a disability.

Although School A still did not suspect that the student had a disability and required special education and did not believe that evaluating the student was warranted, ultimately it only proceeded with the evaluation because of Petitioner's insistence and only after she had obtained an advocate who made what was third request that the student be evaluated.

Respondent asserted School A reviewed data regarding the student and based on that data made a reasonable conclusion that the student was not in need of special education despite his attention and behavioral concerns and despite the parental request. Respondent cited case law in its closing statement from other jurisdictions to support its argument in this regard. However, the cases Respondent cited all involved "Child Find" which was not at issue in this case. In at least one of the cases cited, the Court stated there was no obligation to evaluate the student prior to a parental request.[10] However, in the instant case, there was an explicit parental request that the student be evaluated on October 19, 2015. That parental request created an obligation that the student be evaluated.

Based upon this evidence, the Hearing Officer concludes that School A should have, but did not, fully evaluate the student in response to Petitioner's October 19, 2015, request and did not comply with the requirements of IDEA that the student be fully evaluated in response to a parental request. The Hearing Officer concludes that School A's refusal and failure to fully and timely evaluate the student in response to Petitioner's October 19, 2016, request that the student be evaluated for special education was denial of FAPE to the student.

In response to the request for evaluation Petitioner's advocate made on April 20, 2016, School A completed the psycho-educational evaluation on July 14, 2016, and determined the student eligible on July 21, 2016. This evaluation and determination was made within the required 120 days of the April 20, 2016, request. Therefore, Petitioner did not sustain the burden of proof by a preponderance of the evidence on this portion of the issue adjudicated.

ISSUE 2: Whether the LEA denied the student a FAPE by failing to provide an independent evaluation without unnecessary delay, or timely requesting a due process hearing after a parental request for an independent evaluation and Respondent's refusal to conduct the evaluation.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that there was unreasonable delay in School A filing for a due process hearing to defend its evaluation.

34 C.F.R 300.502 provides that a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject

[10] *R.E. v. Brewster Central School District*, 67 IDELR 214 (S.D. NY 3/30/16).

to the conditions in paragraphs (b)(2) through (4) of this section.

If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to Sec. Sec. 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

Petitioner filed her due process complaint asserting, among other things, that School A neither provided Petitioner the requested IEE, nor timely filed for due process to defend its evaluation. However, the evidence demonstrates that, even though School A refused to authorize the IEE, there was an expressed intent by School A's counsel to file for due process and defend its evaluation. The evidence clearly demonstrates the parties had back and forth communications in attempts to resolve Petitioner's concerns about School A's evaluation. There was somewhat less than two months between the time Petitioner first requested the evaluation and her filing her due process complaint. Whether a delay in granting an IEE or filing for due process amounts to unnecessary delay and rises to the level of a denial of a FAPE is gauged on a case by case a basis. [11]

Although there was delay by Respondent in filing for due process, the Hearing Officer concludes, based on the evidence in this case, any delay was the result of attempts to satisfy Petitioner and reach some settlement. Petitioner contributed to some of the delay, acknowledging that she had not responded to School A's offer because of her busy schedule. There was no evidence presented that any delay in granting the request for the IEE or

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[11] *Sylvia HILL et al., v. DISTRICT OF COLUMBIA*, 68 IDELR 133, August 26, 2016 The IDEA and its implementing regulations provide no additional guidance on what constitutes an "unnecessary delay." Though vague, this Court has interpreted the statute and regulations as requiring "prompt resolution of disputes involving the educational placement of learning disabled children." *Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F. Supp. 2d 254, 259-60 (D.D.C. 2005). But while such an undue delay constitutes a procedural violation of the IDEA, it does not "inexorably lead a court to find a child was denied FAPE." *Smith v. Dist. of Columbia*, No. 08-2216, 2010 U.S. Dist. LEXIS 125754, 2010 WL 4861757 (D.D.C. Nov. 30, 2010). Rather, the procedural violation must have affected the child's substantive rights. Id. "A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of Dist. of Columbia*, 637 F. Supp. 2d 11, 18 (D.D.C. 2009). On the other hand, "[a] delay of more than 2-3 months is likely fatal to the [school] district's case, although the exact length will depend on the circumstances rather than being a bright-line test." Perry A. Zirkel, Independent Educational Evaluation Reimbursement Under the IDEA: An Update, 306 Educ. L. Rep. 32, 35 (2014).

Respondent filing for due process between August 3, 2016, and September 26, 2016, when Petitioner filed her complaint, harmed the student or violated his substantive rights.

The Hearing Officer, thus concludes that School A's delay in filing for due process to defend its evaluation in this instance was reasonable and did not amount to unnecessary delay and did not deny the student a FAPE.

ISSUE 3: Is the evaluation Respondent conducted of the student dated July 14, 2016, appropriate under IDEA pursuant to 34 CFR §§ 300.304 – 300.306.

Conclusion: Respondent sustained the burden of proof by a preponderance of the evidence that the evaluation Respondent conducted of the student dated July 14, 2016, was appropriate and met the requirements of 34 CFR §§ 300.304 – 300.306.

In her complaint Petitioner asserted she disagreed with School A's evaluation, requested an IEE and that School A failed to timely grant the IEE or timely file for due process. Petitioner did not assert the nature of her disagreement with the evaluation.

Respondent in its counterclaim asserted its evaluation was appropriate, was conducted by qualified personnel who used a variety of assessment tools and technically sound instruments, and the findings of the evaluation were supported by the assessment results and are valid and reliable.

The appropriateness of an evaluation can be measured by the requirements of IDEA and whether the methodology employed in conducting the evaluation was appropriate.[12]

Pursuant to 34 C.F.R. § 300.304 an agency must ensure, among other things, that a child is assessed in all areas related to the suspected disability.

Pursuant to 34 C.F.R. § 300.305 an agency must ensure, among other things, that as part of an initial evaluation it reviews existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or state assessments, and classroom-based observations… and identify what additional data, if any, are needed to determine whether the child is a child with a disability.

Pursuant to 34 C.F.R. § 300.306 upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child determines whether the child is a child with a disability.

After Respondent filed its counterclaim to defend its evaluation, the Hearing Officer directed that Petitioner file a response to the counterclaim, which Petitioner failed to do timely. Only after Respondent filed its motion for a default finding as to the counterclaim did Petitioner, in her

[12] IDEA and its implementing regulations do not establish the standards for any particular evaluation or assessment tool. One measure of an evaluation's appropriateness is the use of appropriate methodology in conducting the evaluation. *E.L. Haynes Public Charter School v. Frost*, et al., 66 IDELR 28, September 11, 2015

opposition to the motion, respond to the counterclaim. Even in that opposition, Petitioner did not state specifically what she disagreed with in School A's psycho-educational evaluation.[13]

As result of Petitioner failing to file a response to the counterclaim, the Hearing Officer in a pre-hearing order limited the defense Petitioner could present regarding the appropriateness of School A's evaluation at hearing. Nonetheless, Petitioner was still allowed to present evidence that was beyond the limitation.[14]

Petitioner's presented an expert witness who testified that he agreed that diagnostic tools used by the School A psychologist were appropriate and he did not disagree with the assessment results. However, this witness disagreed with the School A psychologist's interpretation that the results supported a diagnosis of ODD. He opined that he would have not interpreted the data to make that diagnostic conclusion.

Respondent presented the psychologist who evaluated the student and prepared the evaluation. The evidence demonstrated that she was qualified to administer the assessments that she administered. Respondent also presented testimony from another psychologist. Both of these witnesses were qualified as expert witnesses and credibly testified that assessment tools used in the evaluation were appropriate and the correct methodology in administering the assessments and conducting the evaluation was used. These witnesses also both testified that the evaluation data supported the student's ODD diagnosis.

The Hearing Officer credits and finds more persuasive the testimony of Respondent's witnesses. Petitioner's expert witness did not challenge, and actually agreed with, the assessments used, the methodology and the results of the evaluation. His disagreement was with the interpretation, as he would have interpreted the data differently, and only as to the ODD diagnosis. The Hearing Officer was unconvinced by his testimony in that regard, as it is was a matter of subjective professional interpretation of the data, and there were two other qualified experts who credibly testified that the data supported the ODD diagnosis.

Although the student did not display the same behavioral difficulties at home as he did at school, and the parent and the student did not respond in surveys they completed that the student displayed symptoms of ODD, based on the student's conduct and the responses from the student's teachers, the evidence does support that the School A psychologist's conclusion regarding the ODD was reasonable and appropriate. Petitioner presented no other basis to challenge the validity of the School A evaluation, and evidence in this case did not demonstrate any other basis. School A's evaluation used appropriate methodology and otherwise met the

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[13] The Hearing Officer notes that 34 C.F.R 300.502 (b)(4) provides if a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation.

[14] The Hearing Officer stated on the record that despite his initial ruling he would allow other evidence in the record to ensure the record was complete even though he might not consider evidence beyond what was allowed in the ruling on Respondent's motion for default finding as to the counterclaim. In fact, Petitioner's expert witness actually testified contrary to that defense. He testified that the teacher's comments about the student were not overly negative and that parent not completing one of the surveys was not a basis to challenge the evaluation.

requirements delineated in IDEA. Consequently, the Hearing Officer concludes that Respondent sustained the burden of proof that its psycho-educational evaluation was valid and appropriate.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student was denied a FAPE by School A failing to timely evaluate the student following Petitioner's October 19, 2015, request. As relief for the denial of FAPE determined herein, the Hearing Officer grants Petitioner an independent comprehensive psychological evaluation with School A funding.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526. Although Petitioner requested compensatory services, Petitioner presented no evidence from which the Hearing Officer could determine a compensatory education award, and there was no other evidence in the record from which to do so. Consequently, as previously mentioned, the Hearing Officer, as relief for the denial of FAPE determined herein, grants Petitioner an independent comprehensive psychological evaluation with School A funding.

ORDER: [15]

1. School A shall, within ten (10) school days of the issuance of this Order, fund and provide Petitioner written authorization for an independent comprehensive psychological evaluation at the OSSE approved rate.

2. School A shall, within fifteen (15) school days of its receipt of the independent comprehensive psychological evaluation from Petitioner, convene a MDT meeting to review the independent evaluation and review and revise the student's IEP as appropriate.

3. All other relief requested by Petitioner is denied.

[15] Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

4. School A's psycho-educational evaluation of the student dated July 14, 2016, is hereby deemed appropriate, and it meets the requirements of 34 CFR §§ 300.304 – 300.306.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

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Coles B. Ruff, Esq.
Hearing Officer
Date: December 10, 2016

Copies to: Counsel for Petitioner
Counsel for LEA
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}
CHO
contact.resolution@dc.gov